vision that a will might be revoked by a written will or other writing of the testator, declaring such revocation, and executed with the same formalities as a will. (§ 1292.) The proponent offered the first will for probate. The contestant, to establish intestacy, offered to prove its revocation by the revocation clause of the lost will, upon the testimony of the one available witness. *Held*, that the second will was inoperative as a revocation. *In re Thompson's Estate*, 198 Pac. 795 (Cal.).

Under the Code the second will could not be probated. The majority, holding that the revocatory clause could not be given effect apart from the will containing it, decided that there was no revocation. The weight of authority and reason is with the minority view, that the second will, being executed with the requisite formalities, is valid as a revocation. *Matter of Wear*, 131 App. Div. 875, 116 N. Y. Supp. 304; *Vining* v. *Hall*, 40 Miss. 83. It is clear that a written revocation need not be the valid last will of the testator. See CAL. CIV. CODE, § 1292. And, further, a revocation acts *eo instanti*. *Brown* v. *Brown*, 8 E. & B. 876; *Lones* v. *Lones*, 108 Cal. 688, 41 Pac. 771. But if the first will is thus revoked and the second cannot be probated, the obvious intent of the testatrix to leave her property to the proponent will be defeated. Can her intent be properly effectuated? It is apparent that she revoked the first will relying on the certainty of probate of the second. The doctrine of dependent relative revocation is applied to relieve against a revocation made under a present mistake. See Joseph Warren, "Dependent Relative Revocation," 33 HARV. L. REV. 337, 348 *et seq.* In the principal case supervening circumstance, the loss of the second will, rendered probate impossible. In the law of contracts, the substantive rules of mistake and impossibility are inherently the same. See 3 WILLISTON, CONTRACTS, § 1953. The impossibility in the principal case should not be allowed, any more than present mistake, to defeat the testatrix's intent. The revocation should be recognized as valid, but set aside.

BOOK REVIEWS

ESSAYS ON CONSTITUTIONAL LAW AND EQUITY. By Henry Schofield. Boston: Chipman Law Publishing Co. 1921. Vol. I, pp. xxiv, 456. Vol. II, pp. viii, 457–1006.

The subject matter of some of these essays is of local interest only, such as the articles on the "Street Railroad Problem of Chicago" and the "State Civil Service Act and the Power of Appointment." Others, however, contain valuable discussions of fundamental problems of constitutional law, conflict of laws and equity, such as the relation of federal and state courts under the due process clause, the problem of *Swift* v. *Tyson*,[1] the scope of the full faith and credit clause, the vexatious problem of jurisdiction for divorce, the specific enforcement of negative covenants, and the rule of mutuality.

In the dedication Professor Schofield is spoken of as a consummate master of constitutional law. There is much in the essays to justify this. A wide and accurate knowledge and understanding of the actual decisions is displayed. In fact at times the argument is so packed with authorities as to make heavy going for the reader. The author does not hesitate to depart from the beaten paths of his subject. He proposes and defends with vigor and originality

[1] 16 Pet. (U. S.) 1.

several theses startlingly contrary to ideas generally accepted. The essays are remarkably free from a "jurisprudence of conceptions." The theory that judges only declare pre-existing law and do not make law is recognized as a fiction, but the author finds value in the fiction as a restraint on action too much at large. When he contends for a wider application to state decisions of the due process clause of the fourteenth amendment, he overemphasizes this value, but in the main the nature of the judicial process is clearly seen. The patient reader has to struggle at times to wrest the argument from a very involved style which is only occasionally relieved by shorter sentences and clearer forms of expression, but his diligent attention is rewarded by ideas which are stimulating and valuable even when he does not assent to them.

The author shows a passion for uniformity and centralization. Problems of the relation of federal and state courts on matters of state law he always solves in favor of the former. The due process clause, he says, applies to the decisions of a state supreme court as well as to the acts of its legislature, but to a wider extent. "Due process of law as a restraint upon state judges means the whole body of the existing law." Thus a state court may render a decision as to state law so erroneous that the litigation will not be due process of law although the jurisdiction may be complete and the procedure perfect. "But when a state disregards or misapplies established principles of State law and makes John Doe suffer for the Commonwealth's sake, the cases show, I think, that its action may be vetoed by the Supreme Court of the United States." This comes perilously close to making the principle of *stare decisis* an essential element of due process of law. The qualification is added, however, that the departure from established principles must be "so gross as to shock the reason and justice of mankind." A distinction is made between error and error so great as to be lawlessness. This veto power, it is argued, should be exercised to prevent the localization of justice "to unreasonable extremes." It is assumed that localization of justice is necessarily bad, and the expediency of so wide an appellate jurisdiction in an already overburdened Supreme Court is not discussed.

When a federal court obtains jurisdiction because of diversity of citizenship alone, and decides a question of so-called general law contrary to the established principles laid down by the state court, which since *Swift* v. *Tyson* it may do, the author contends the state court should follow the federal. This solution he finds in the constitutional grant of judicial power to the federal courts in controversies between citizens of different states, and in the provision of Article VI, "This constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land." The attempt to explain the contrary decision of the Supreme Court[2] is not convincing. The desire for uniformity has led to a forced construction of Article VI. The author meets the argument that little will be left of state independence under such a construction by the assertion of the power of the state legislature to change the rule of state law made by the federal court. The wide field remaining for interpretation, both genuine and spurious, of the state statutes is not mentioned, nor the effect of such a supremacy of the federal courts upon the prestige and caliber of the state courts.

The argument that the full faith and credit clause does away with "comity" as a ground for enforcing statutory and common law causes of action accruing in sister states, while hardly supported by the decisions, is perhaps logical as to statutory causes at least and has considerable intrinsic merit. Little has been accomplished by the refusal of state courts on the ground of "public policy" to enforce causes of action created in sister states, except a failure to secure adequately interests which it was the aim of the state law where the

[2] Delmas *v.* Merchants' Insurance Co., 14 Wall. (U. S.) 661.

cause of action arose to protect. But it is hard to accept the argument that this same clause admits of an extension to give the Supreme Court power to declare when a state court rendering a decree of divorce was so lacking in jurisdiction that no other state may enforce the decree, or that in it can be found a power in Congress to pass a national divorce act. Surely the full faith and credit clause is a command to the states to give full faith and credit, not to deny it. Whether such a power to veto the enforcement of a divorce decree of another state lies in the due process clause of the fourteenth amendment is not discussed.

Perhaps the most satisfactory article is that on "Freedom of the Press." The true nature of the problem is pointed out; that is, the necessity of securing social and individual interests by allowing the fullest possible dissemination and discussion of truth and at the same time protecting existing social and political institutions. Truth in statement of fact and fairness of comment are the tests suggested as to the publication of matters of public concern, with motive not an issue. There is a vigorous criticism of "the judge-made law of contempt of court for publication censuring judges" by persons not parties to the litigation in question as "intolerable in a land of equality before the law."

The editors might well have contented themselves with the publication in a single volume of the more fundamental articles of general interest, but the work is published as a tribute to the memory of Professor Schofield by his colleagues, and as a memorial the two volumes fulfill their purpose admirably. They show the scope and nature of the author's work and make it more readily accessible to the profession. The high opinion which those who knew him best had of Professor Schofield and his work as a teacher and scholar appears in the two excellent forewords.

WILLIAM C. VAN VLECK.

THE QUESTION OF ABORIGINES IN THE LAW AND PRACTICE OF NATIONS. By Alpheus Henry Snow. New York: G. P. Putnam's Sons. 1921. pp. v, 376.

This question is: "First. What are the general principles of the law of nations which the colonizing States respectively have recognized and applied and now recognize and apply, as governing their respective relations with the uncivilized tribes which were inhabiting the regions colonized by them at the time they respectively assumed the sovereignty of the regions? Second. To what extent and on what principles have civilized States coöperated with each other in recognizing and applying these principles?" (p. 18).

Mr. Snow's book was written at the request of the State Department that the author "undertake the task of collecting, arranging, and, so far as he may deem necessary, editing the authorities and documents relating to the subject of 'Aborigines in the Law and Practice of Nations.'" This fact explains much in both form and substance. Apparently the author was pressed for time, for the request was made in April, 1918, and the Prefatory Note is dated December, 1918, though the heading of the book (p. 3) announces that it was "written at the request of the Department of State, 1919." In any event it seems to be a compilation intended to serve at the Peace Conference. There is, however, no indication of unfairness toward German colonial administration. The book lacks much of present interest because it omits consideration not only of the question of the mandate system under the League of Nations but of all questions raised by the War (such as recruiting or drafting of aboriginal troops by France) and indeed of everything that has happened in the last ten years, with the exception of a brief reference to our treatment of the Philippines.

The author's main thesis is that in controlling aboriginal races a state acts